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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Western Wireless Corporation)	
Petition for Preemption of an Order)	
Of the South Dakota Public Utilities)	
Commission)	
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	

**COMMENTS
OF THE
UNITED STATES TELEPHONE ASSOCIATION**

The United States Telephone Association (USTA) hereby files its comments on the petition filed by Western Wireless Corporation (Western Wireless) for preemption of an order of the South Dakota Public Utilities Commission (South Dakota) in the above-captioned proceeding.¹ USTA is the principal trade association of the local exchange carrier (LEC) industry. Its members provide over 95 percent of the exchange carrier-provided access lines in the United States.

In its petition, Western Wireless seeks Commission preemption of a South Dakota order that denied a Western Wireless request for designation as an eligible telecommunications carrier (ETC) under Section 214(e) of the Communications Act of 1934, as amended (the Act).² Western Wireless maintains that the South Dakota denial is based on whether the carrier is offering ubiquitous service and has the effect of precluding competitive entrants from providing

¹ Public Notice, DA 99-1356, released July 19, 1999 (Public Notice). By Order, DA 99-1535, released August 4, 1999, the Commission extended the time for filing comments to September 2, 1999 and reply comments to September 17, 1999.

universal service in high cost areas. Western Wireless contends that this constitutes a barrier to entry that must be preempted by the Commission under Section 253 of the Act.³ Furthermore, Western Wireless seeks a Commission ruling that the South Dakota conditions for designation as an ETC “thwarts and impedes” the federal interest in promoting local competition and universal service in high cost areas, in contravention of the Act and Commission policies.

Despite the litany of arguments concurring the purported adverse effects of the South Dakota ruling on competitive entry in local markets, the Western Wireless petition must be decided on jurisdictional grounds. The determinative issues raised by the Western Wireless petition are: (1) whether a state has jurisdiction to determine ETC status; and (2) whether the Commission has jurisdiction to rule on the Western Wireless petition. The answer to the issue of state jurisdiction is clearly in the affirmative. The answer to the issue of Commission jurisdiction is resoundingly in the negative. Thus, the Commission must dismiss the petition for lack of jurisdiction. In the alternative, the Commission should deny the petition on the basis that the South Dakota decision was just and reasonable.

Section 214(e)(2) of the Act specifies that state commissions are given authority to determine whether a carrier is an eligible telecommunications carrier. This is undisputed. Nothing in that section of the Act gives the Commission jurisdiction over the states’ authority to determine ETC status of an individual carrier. In fact, the Commission has acknowledged that Section 214(e)(2) confers exclusive grant of eligibility authority on the states.⁴

Western Wireless attempts to avoid this jurisdictional fatal blow to obtaining the relief sought in its petition by focusing on Section 253 of the Act. Western Wireless maintains that

² 47 U.S.C. § 214(e).

³ 47 U.S.C. § 253.

⁴ *Texas Office of Public Utility Counsel, et al. v. FCC*, No. 97-60421 at § (III)(A)(2)(c) (5th Cir., July 30, 1999) (*Texas v. FCC*).

Section 253 gives the Commission preemptive authority over determinations of the states to impose eligibility requirements and the appropriateness of those requirements. Western Wireless argues that the Commission must preempt the South Dakota decision because its effect is to preclude carriers other than the ILEC from entering the market.

The Fifth Circuit Court of Appeals decision in *Texas Office of Public Utility Counsel, et al. v. FCC*,⁵ which was decided subsequent to the filing of the Western Wireless petition, considered, *inter alia*, whether a state commission may impose its own criteria when evaluating a carrier's eligibility. At issue was the Commission's determination that a state commission has no discretion when assessing a carrier's eligibility for federal universal service support, with limited exceptions for rural areas. The Fifth Circuit ruled that Section 214(e) of the Act does not speak to whether the Commission may prevent state commissions from imposing additional criteria on eligible carriers.⁶ The Court thus found that the Commission erred in prohibiting the states from imposing additional requirements on carriers otherwise eligible for universal service support.⁷ The Court concluded that the states could impose their own eligibility requirements.⁸

This finding of the Court directly controls the ability of the Commission to prohibit state commissions from imposing additional universal service eligibility requirements. Based on this, the Commission has no basis upon which to preempt the South Dakota decision to deny ETC status to Western Wireless.

Section 253 only gives the Commission authority in instances where a state commission has prohibited a carrier from providing telecommunications service or its actions have the effect of prohibiting a carrier's ability to enter a telecommunications market. The South Dakota

⁵ *Id.* at § (III)(A)(2)(a).

⁶ *Id.*

⁷ *Id.*

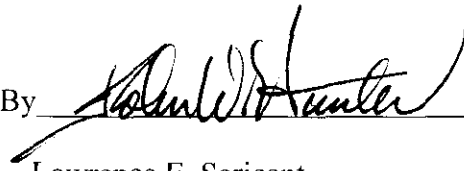
⁸ *Id.*

decision was well within the state's ability to evaluate specific criteria upon which to determine ETC status. Its determinations were just and reasonable.

In conclusion, the Commission must dismiss the Western Wireless petition for lack of jurisdiction. In the alternative, USTA urges the Commission to deny the Western Wireless petition for the reasons stated above.

Respectfully submitted,

UNITED STATES TELEPHONE ASSOCIATION

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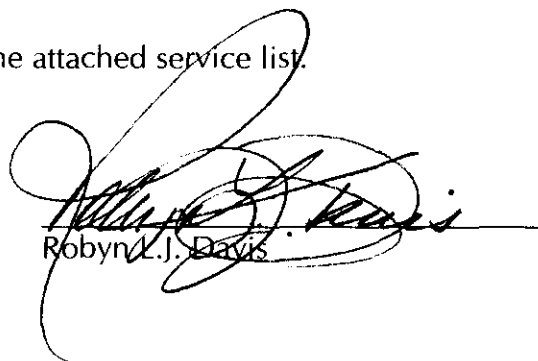
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September 2, 1999

CERTIFICATE OF SERVICE

I, Robyn L.J. Davis, do certify that on September 2, 1999 Comments of the United States Telephone Association were either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the persons on the attached service list.



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